IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 641

REYES ARIAS OROZCO,

Petitioner,

vs.

TEXAS,

Respondent.

BRIEF OF PETITIONER

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To the Honorable Justices of Said Court:

Citation to Opinion Below

The opinion of the Court of Criminal Appeals is not yet reported in a bound volume; it is Opinion No. 40,706 delivered December 6, 1967, and it appears verbatim in the appendix.

Jurisdiction

The judgment of the Court of Criminal Appeals was rendered on December 7, 1967. A Motion for Rehearing was overruled on February 7, 1968, and the judgment became final on that date. The jurisdiction of this court is invoked under 28 USC 1257(3).

Constitutional Provisions Involved

United States Constitution, Fourth Amendment:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Fifth Amendment:

> "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

United States Constitution, Sixth Amendment:

> "In all criminal prosecution, the accused shall enjoy the right to . . . have the assistance of counsel for his defense."

United States Constitution, Fourteenth Amendment:

> "[N]or shall any state deprive any person of Life, Liberty, or Property, without due process of law . . . ."

Question Presented for Review

The question presented for review to this Honorable Court is that of the legality of the arrest, and search, and questioning, and subsequent admission into evidence during the course of the trial of statements made, physical objects seized, and results of tests performed on the illegally seized

object (a pistol). The petitioner was arrested after being awakened in his bedroom in a boarding house by four policemen who were standing around his bed, at which time he was interrogated concerning his whereabouts on the night in question and whether or not he owned a pistol. This on the scene interrogation took place without the petitioner being warned of his constitutional rights to remain silent or to cease discussion at any time or of his right to have an attorney present during his interrogation.

Statement of the Case

On January 5, 1966, a Dallas Police Department Patrolman noticed five or six persons standing on the sidewalk near a car with the door open (R. 47). When the patrolman stopped to investigate, he discovered the body of a man who had been recently shot in the head. The body was taken to the hospital and after investigation at the hospital, Dallas Police Detectives took one witness by the boarding house where the petitioner was living. The witness pointed out the automobile parked at the house as belonging to this petitioner. The police then took the witness downtown, booked him into the jail, and returned to the house the witness had pointed out. At this time, it was approximately 4:30 o'clock in the morning (R. 76, L. 22 to R. 78, L. 25). They knocked on the door and were admitted by a woman who was not identified at the trial (R. 81). They had no arrest warrant and no search warrant (R. 79). This petitioner was asleep in his room and after being awakened by the detectives and being interrogated in his bedroom stated that he had been at the scene of the shooting, and after first refusing to reply to the question of whether he owned a pistol or not, the petitioner, after persistent questioning by the four police officers that were

standing around his bed, then told the detectives that the pistol was in the washing machine, where it was found by the detectives (R. 84, L. 5 to R. 85, L. 24). Ballistics tests on the pistol revealed that it was the murder weapon (R. 92, L. 4 to R. 93, L. 14). This illegally seized evidence was then later used very effectively by the prosecution in their summation to the jury (R. 119, L. 12 to R. 120, L. 14 and R. 131, L. 15 to R. 131, L. 24).

The Argument

Excerpts from the record containing the testimony of Detective Brown on direct examination and cross examination show clearly the manner in which this petitioner's constitutional rights were first violated by in custody interrogation without warning and secondly, by the subsequent admission into evidence during the course of the trial of testimony concerning this petitioner's responses to the interrogation, physical objects seized, and ballistics tests performed upon the pistol.[1]

The following exchange took place during the voir dire examination of Detective Brown by Mr. Barclay, the petitioner's trial counsel:

> Q. Okay. You may answer the question: What did you do after you got inside?
>
> A. We walked in and the lady pointed to the room where this defendant was *asleep*. He was awake when we got into the room and he evidently heard the conversation. I don't know, but he was awake anyway.

[1] This testimony was especially damaging in view of the fact that prosecution's case depended entirely upon circumstantial evidence (see R. 9—Court's charge on circumstantial evidence).

Q. Okay.

A. *And we asked him his name—I did* (R. 82-82). (Emphasis added.)

Later upon cross examination by Mr. Barclay, Detective Brown testified as follows:

Q. Mr. Brown, at the time you walked into the bedroom there, where the Defendant was in bed, was he free to come and go at the time?

A. As far as we were concerned, all I wanted to know was his name.

Q. I see. When you ascertained his name, was he free to leave?

A. No.

Q. So, all right, so during the time that you had this conversation with him pertaining to the gun, he was under arrest. Is that correct?

A. Yes, *after I found out his name.* (Emphasis added.)

• • • • •

Q. *Mr. Barclay:* All right, now, at this time, we will object to any testimony with reference to any conversation pertaining to this particular gun or any conversation with reference to any subject matter between the witness and the defendant at that particular time on the grounds that the state has failed to lay a proper predicate; further object to the manner and method in which the arrest and search was perfected; and further, on the grounds that it fails to meet with the provisions outlined by the Code of Criminal Procedure; and furthermore, specifically, on the grounds that the prosecution has failed to provide testimony

to show that the police department obtained a search warrant or warrant of arrest at that particular time.[2]

The Court: Overruled.

Mr. Barclay: Exception.

As Detective Brown's testimony shows, this petitioner was under arrest from the moment he told the officers his

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[2] The legality of the arrest of your petitioner was very earnestly contested in the State Courts, based upon Article 14.04 of the Texas Code of Criminal Procedure: "Where it is shown by satisfactory proof to a peace officer that a felony has been committed, and that the offender is about to escape so *that there is no time to procure a warrant,* such peace officer may, without warrant, pursue and arrest the accused." (Emphasis added.) As the above testimony shows, your petitioner was in bed and asleep at the time of his arrest. Hardly a likely place for an offender who "is about to escape." Furthermore, the deputies had time to drive by your petitioner's boarding house with the witness taken from the hospital, continue to the Police Station and book the witness in and then return to the boarding house.

The following Texas cases have held that the requirement that the offender be about to escape is mandatory: *Rippy* v. *State,* 53 S.W. 2d 619 (CCA 1932) (In *Rippy,* the accused was partially undressed and in bed and the Texas Court of Criminal Appeals pointedly held that "that part of the statute which says that 'the offender is about to escape' is indispensable."); *Vinson* v. *State,* 137 S.W. 2d 1048 (Police officer arrested the accused at home in bed approximately six hours after the officer had been told to arrest the accused. In the process of making the illegal arrest the police officer noticed mud on the accused's shoes, which mud was significant at the subsequent trial. Admission of testimony concerning mud on the appellant's shoes by the police officer who made the illegal arrest was held to be error on the part of the trial court and the case was therefore reversed); *Tarwater* v. *State,* 267 S.W. 2d 410 (Sheriff entered the accused's room without a search warrant and discovered a torn up forged check in the commode. He also found the accused hiding under the bed. The search was made without a search warrant and the court found that the accused was not about to escape and there was no showing that there was not sufficient time to procure a warrant of arrest. The court relied upon *Rippy* v. *State, supra,* and stated that "the only distinction in that case and in this case upon the question mentioned is that, here, appellant was under the bed and not in it").

name. Testimony also shows that this was the first question asked by Detective Brown when he and the three other detectives entered the sleeping petitioner's bedroom at 4:30 in the morning. The testimony further shows that even though the petitioner was under arrest at this time, as stated by Officer Brown, the questioning continued:

Q. Okay, now what did you say to him if anything besides, "What's your name?"

A. Yes. I don't recall all the conversation, I asked him his name and he told me and I asked him if he had been out to the El Farleto (the scene of the shooting) that night.

Mr. Barclay: Objection.

The Court: Overruled.

Mr. Barclay: Could I have the witness on voir dire examination?

The Court: No.

Mr. Barclay: Exception.

The Court: Go ahead.

A. He said that he had. I asked if he owned a pistol.

Mr. Barclay: Objection.

The Court: Overruled.

Mr. Barclay: Exception.

A. He said, "Yes". I said, "Where is it?", *and he didn't answer at first. Then I asked him again.* He said, "It's in the back in the washing machine." (Emphasis added.)

Q. (continuing) Okay, did you go back to the washing machine?

A. Yes. I asked him where the washing machine was and he pointed to a little small room in the back

of the house. (The gun upon which ballistics tests were later performed by the Police Department was recovered from the washing machine at this time) (R. 84-85).

Thus, the police arrested this petitioner, gave him no warnings of any kind as required by the Supreme Court cases of *Escobedo* v. *State of Illinois*, 378 U.S. 478, and *Miranda* v. *State of Arizona*, 384 U.S. 436, and then questioned him in a police dominated atmosphere about the shooting for which he was under arrest.

Certainly it cannot be argued that after the officer arrested this man the officer was still conducting a general inquiry into an unsolved crime—from the moment this petitioner was arrested, the police investigation was focused upon him and no other. In fact, the police investigation was focused on him as soon as the witness to the shooting drove by this petitioner's boarding house and pointed out his car to the police. During the time this petitioner was questioned in his bedroom, he was in police custody, under arrest, and was certainly more than a suspect. But without giving proper warnings—or any warnings at all—the police elicited from this arrested man the fact that he had been to the scene of the shooting that evening; that he did own a pistol; and the whereabouts of his pistol. When these statements of the petitioner were later erroneously admitted into evidence by the trial court, the State was thereby allowed to show the possible guilt of this petitioner as surely as if a written and signed statement saying "I did it" had been admitted.[3]

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[3] The admission into evidence of the petitioner's statements made at the time of his arrest was also strenuously argued in the state

Was the interrogation of your petitioner by the police officers an "in custody" interrogation? On this question, in *Miranda, supra,* at page 444, this Court stated that: "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person *has been taken into custody or otherwise deprived of his freedom of action in any significant way.*" (Emphasis added.) At this point, the Court added a footnote saying, "This is what we meant in *Escobedo* when we spoke of investigation which is focused on an accused." Looking again at the case at bar, we find police had entered the bedroom uninvited of this petitioner; there were four police officers standing around his bed; he was under arrest; the interrogation began—*"Where is it, and he didn't answer at first. Then I asked him again . . ."* (R. 85). Even though this petitioner did

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court, based upon Article 38.22 of the Texas Code of Criminal Procedure which requires that an oral or written confession of a defendant, taken while the defendant is in the custody of an officer, shall be admissible only if made in the presence of an examining court, or else it must be in writing and signed by the accused and the defendant must have, prior to making the statement, waived his right to have a lawyer present and been told that if he cannot afford an attorney one will be appointed to represent him and further that he may remain silent and that any statement he makes may be used in evidence against him at his trial.

Article 38.22 (f) makes an exception to the inadmissibility of a confession when the confession is in the form of a *res gestae* statement. In regard to the question as to whether or not the statements made by this petitioner were *res gestae* the Texas Court of Criminal Appeals has consistently held that such statements must be spontaneous and not in answer to questions propounded by the arresting officers. In *Rubenstein* v. *State,* 407 S.W. 2d 795, this court stated that "the test in this state is spontaneity and these facts do not fit that case." Also see *Grimmel* v. *State,* 355 S.W. 2d 614, wherein the Court of Criminal Appeals ruled that "statement made by the defendant, while under arrest, after he had certain currency and told the police officers 'Well, I guess you've got me' or something to that effect, tended to show an admission of guilt and was therefore not admissible."

not want to answer, the interrogation continued in the bedroom while in the custody of four police officers. Answers were elicited from this petitioner, who still had sleep in his eyes, without his having been told of his right to remain silent or his right to have an attorney present if he so chose.

To quote again from *Miranda, supra:*

> *"Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated,* the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own, does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned." (Emphasis added.)

From the foregoing, it may be seen that the trial court erred by admitting illegally obtained evidence, i.e., the statement that the defendant had been to the cafe the night of the shooting; the statement that the defendant did own a pistol and its whereabouts; and the admitting into evidence of the ballistics tests performed on this pistol.

Conclusion

In consideration of the above and foregoing, your petitioner respectfully requests that this Honorable Court enter an order remanding the case to the trial court for a prompt new trial and specifying that the statement made by your petitioner without proper warning, the testimony regarding the finding of the pistol and where it was found, and the results of the ballistics tests subsequently performed upon the pistol be prohibited from being introduced into evidence on a new trial on the merits.

Respectfully submitted,

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